

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS**

YU HUA JIN AQUINO,

Plaintiff,

vs.

DELORES SAN NICOLAS, Individually
and in her Official Capacity as Secretary
of Corrections, GREGORY F. CASTRO,
Individually and in his Official Capacity
as Director of Corrections, KATHLEEN
BUSENKELL, Individually and in her
Official Capacity as an Assistant Attorney
General, COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS, and
DOES 1-10,

Defendants.

Civil Case No. 09-0042

**MEMORANDUM OPINION AND
ORDER REGARDING
DEFENDANTS' MOTIONS TO
DISMISS**

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This case involves claims arising from the plaintiff’s detention pending deportation after completion of her sentence for drug offenses. It is before the court on the defendants’ second round of motions to dismiss after the court granted the defendants’ first round of motions, but permitted the plaintiff to amend her complaint to attempt to address deficiencies. The plaintiff’s amended complaint reasserts her original claims of a due process violation and intentional infliction of emotional distress, but also adds claims of breach of contract and tortious breach of duty. The defendants contend that the plaintiff’s new and repleaded claims are no more tenable than her original claims, so they seek dismissal of all claims with prejudice.

I. INTRODUCTION

A. Factual Background¹

Plaintiff Yu Hua Jin Aquino, a citizen of the People’s Republic of China and a resident of Saipan, CNMI, was arrested in Saipan on April 13, 2008, on drug charges.

¹ As the court noted in its ruling on the first round of motions to dismiss, “[w]hen ruling on a defendant’s motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)). Thus, the factual statement here is based on the plaintiff’s allegations in her First Amended Complaint (docket no. 18).

She eventually entered a guilty plea to two of the charges against her and agreed to be deported at the conclusion of her sentence

Specifically, on October 8, 2008, Aquino appeared before the Superior Court of the Commonwealth of the Mariana Islands for a change of plea hearing. A Judgment and Commitment Order, signed October 10, 2008, stated that Aquino entered guilty pleas to “the offense [sic] of **Illegal Possession of Controlled Substance** [sic] as charged in **Counts II and III** of the Information, in violation of **6 CMC § 2142(a)**.” Commonwealth Defendants’ Motion To Dismiss (docket no. 19), Exhibit 1 (Judgment and Commitment Order, October 10, 2008, Criminal Case No. 08-0066 (T)) (emphasis in the original), 1.²

² A court considering a Rule 12(b)(6) motion to dismiss ordinarily may not consider matters outside of the pleadings without converting the motion to a motion for summary judgment pursuant to Rule 56. *See, e.g.*, FED. R. CIV. P. 12(d). “A court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment.” *United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003) (also noting, “Even if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s claim.”); *see also Khatib v. County of Orange*, 603 F.3d 713, 715 n.1 (9th Cir. 2010) (the court properly considered on a motion to dismiss reports offered by the plaintiff and judicially noticed by the court without converting the motion to a motion for summary judgment); *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (a document is not considered “outside the pleading” for purposes of Rule 12(b) “if the complaint specifically refers to the document and if its authenticity is not questioned”); *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988) (a court may “take judicial notice of matters of public record outside the pleadings” without converting a Rule 12(b)(6) motion to dismiss to a summary judgment motion). Although the plaintiff attached no documents to her First Amended Complaint, any documents outside of the pleadings identified or quoted here are matters of public record, and/or were referred to extensively in the First Amended Complaint as forming the factual background or basis for the plaintiff’s claims, and all were offered by the defendants in support of their motions to dismiss without objection from the plaintiff. The court has chosen to rely on what these documents actually say, rather than what the parties (continued...)

The Judgment and Commitment Order also stated that, pursuant to the terms of a plea agreement, Aquino was sentenced to one year imprisonment on each count, to run concurrently, with credit for time served. *Id.* at 2. It also stated,

Both sentences . . . are to be served without parole, under the following conditions:

- a. The Defendant stipulates to deportation in the contemporaneously filed Stipulation to Deportation with the Superseding Agreement;
- b. The Defendant shall be deported upon completion of her jail term, and when completed, she shall be *immediately* transferred to the custody of the Commonwealth or Federal Immigration Authorities for removal from the CNMI. . . .

Judgment and Commitment Order at 2-3 (emphasis added). Finally, the Judgment and Commitment Order stated, “Defendant shall be released on April 11, 2009 at 8:00 a.m., and shall be released *immediately* to the CNMI or Federal Immigration Officials for *immediate* removal from the CNMI.” *Id.* at 3 (emphasis added). An Amended Judgment and Commitment Order corrected Aquino’s release date to April 13, 2009.

The Stipulation To Deportation And Order referred to in the Judgment and Commitment Order was signed by the prosecutor on September 24, 2008, and by Aquino on October 7, 2008. Commonwealth Defendants’ Motion To Dismiss (docket no. 19), Exhibit 2 (Stipulation To Deportation And Order, Criminal Case No. 08-0066 (T)), 1. In it, the parties stipulated as follows:

The parties hereby indicate that rather than proceeding with a hearing to show cause as to why Respondent should not be deported, they wish to stipulate to an Order of Deportation.

²(...continued)

assert that they say, without converting the defendants’ motions to dismiss to motions for summary judgment.

Having been advised of the consequences of deportation, the Respondent agrees to waive her right to a deportation hearing and to proceed with the stipulation. The Respondent does not dispute that she is a national of the Republic of China and a deportable alien pursuant to 3 CMC § 4340(d) and (e), in that she was convicted of two (2) felonies—Illegal Possession of Controlled Substances, in violation of 6 CMC § 2142(a), in Criminal Case No. 08-066 T. The parties further stipulate that Respondent has no legal right to remain in the Commonwealth.

Stipulation To Deportation at 1. The Stipulation To Deportation included the following paragraph, which was signed by the Chief Prosecutor, Counsel for Immigration, on September 23, 2008, as “Reviewed and Approved on behalf of the Division of Immigration,” and signed by Aquino and her defense counsel, on October 7, 2008:

I, YUHUA JIN AQUINO, hereby stipulate to an order of deportation. I understand my right to a deportation hearing and agree to waive this right. I also understand my right to be represented by counsel. I understand that an Order of Deportation is a permanent ban from the CNMI. I understand the purpose and nature of this stipulation and have signed it on my own free-will.

Stipulation To Deportation at 2. Finally, the ORDER portion of the Stipulation To Deportation, signed by the sentencing judge on October 10, 2008, stated the following:

Pursuant to a Stipulation of the Parties, the Respondent is hereby ordered deported from the Commonwealth of the Northern Mariana Islands. Any passport in the custody of the Court shall be released to an Immigration Investigator for repatriation purposes.

Stipulation To Deportation at 3.

Aquino was not released or deported immediately upon the completion of her sentence on April 13, 2009, nor was she taken before a judge to have her continued detention reviewed. Instead, she remained incarcerated until July 10, 2009, a period of 88 days. On May 15, 2009, defendant Kathleen Busenkell, an Assistant CNMI Attorney

General, filed Civil Action No. 09-0194 in the Commonwealth Superior Court to have Aquino deported and attached to the petition the Stipulation To Deportation And Order previously entered in the criminal case, but no deportation proceedings were set. Aquino eventually retained private counsel on July 9, 2009, to try to obtain her release from custody. On July 10, 2009, on a motion by Aquino's counsel, which was not opposed by Busenkell, the Commonwealth Superior Court ordered Aquino released on her own recognizance.³

B. Procedural Background

Aquino filed her original Complaint (docket no. 1) in this case on November 23, 2009, alleging federal question jurisdiction pursuant 28 U.S.C. § 1331. She named as defendants the Commonwealth of the Northern Mariana Islands (CNMI); Delores San Nicolas, individually and in her official capacity as CNMI Secretary of Corrections; Gregory F. Castro, individually and in his official capacity as CNMI Director of Corrections; and Kathleen Busenkell, individually and in her official capacity as an Assistant CNMI Attorney General. When appropriate, the court will refer to defendants CNMI, San Nicolas, and Castro collectively as the Commonwealth Defendants. Aquino's claims in her original Complaint were the following: (1) a claim, pursuant to 42 U.S.C. § 1983, for violation of her due process rights under the Fourteenth Amendment of the United States Constitution and the Commonwealth Covenant arising from her continued

³The defendants maintain that the reason that Aquino could not be deported and remained in custody pending deportation was that her passport was invalid. Aquino's First Amended Complaint does not contain any such allegation, which the court could take as true, nor has any party attached to briefing of the motions to dismiss a public document reflecting the status of Aquino's passport from which the court could take judicial notice. Thus, the defendants' allegation that Aquino's passport was invalid is outside of the record and cannot be considered on their Rule 12(b)(6) motions to dismiss.

detention pending deportation without review by a judge; (2) a claim for punitive damages; (3) a claim for intentional infliction of emotional distress arising from the same circumstances as her due process claim; and (4) a claim for attorneys fees, pursuant to 42 U.S.C. § 1988.

On January 25, 2010, defendant Busenkell and the Commonwealth Defendants filed separate motions to dismiss (docket nos. 4 & 5). The undersigned resolved those motions in a Memorandum Opinion And Order (docket no. 17), filed May 27, 2010, as part of the undersigned's first assignment as a visiting judge to the District of the Northern Mariana Islands. *See Aquino v. San Nicolas*, 2010 WL 2196134 (D. N. Mar. I. May 27, 2010).

More specifically, as to Aquino's claim of a due process violation pursuant to 42 U.S.C. § 1983, the court noted that Aquino claimed that the defendants violated her constitutional rights by her continued detention after the completion of her sentence, without review of the detention by a judge, and that the crux of her due process argument was that her detention while waiting to be deported was analogous to detention following a warrantless arrest. Memorandum Opinion And Order at 16. The court concluded, however, that Aquino's 88-day detention without a bail hearing was neither specifically provided for nor prohibited by statute, so that the questions were whether Aquino's due process rights were violated by the failure to deport her "immediately" upon the completion of her sentence, as she claimed the Judgment and Commitment Order required, and whether, absent immediate deportation, she was entitled to a bail hearing. *See id.* at 17-18. Relying on *Demore v. Kim*, 538 U.S. 510 (2003), and *Zadvydas v. Davis*, 533 U.S. 678 (2001), the court concluded that Aquino had not alleged a violation of her due process rights as a matter of law, because the United States Supreme Court had presumed that detention of an alien prior to deportation for as long as six months, without the requirement of a bail hearing, is reasonable. Memorandum Opinion And Order at 21. The court found that the failure to allege the violation of a constitutional right was fatal to

Aquino's § 1983 claim. The court stated that it would "dismiss Aquino's claim, under § 1983, as to all defendants, unless properly amended." *Id.* at 22. Similarly, the court found that, because Aquino's pre-deportation detention was constitutional, she had not alleged any "outrageous" conduct that would support her claim of intentional infliction of emotional distress. *Id.* at 24-25. The court stated that it would "dismiss Aquino's claim for Intentional Infliction of Emotional Distress, as to all defendants, unless amended as provided for below." *Id.* at 25.

The court concluded that Aquino was entitled to amend her Complaint as a matter of course, because no responsive pleading had yet been served. *Id.* at 26. Although the court believed that it was unlikely that Aquino would be able to amend her Complaint to successfully assert a claim under § 1983 or a claim for intentional infliction of emotional distress, the court declined to dismiss those claims with prejudice. *Id.* Instead, the court granted the defendants' motions to dismiss, but without prejudice, and granted Aquino leave to amend her claims of a due process violation and intentional infliction of emotional distress within ninety days. *Id.* at 27.⁴

On August 25, 2010, just at the ninety-day deadline, Aquino filed her First Amended Complaint (docket no. 18), asserting both federal question jurisdiction pursuant to 28 U.S.C. § 1331 and diversity jurisdiction pursuant to 28 U.S.C. § 1332. Relying on essentially the same factual allegations found in her original Complaint, Aquino's First Amended Complaint asserts the following causes of action: (1) deprivation of due process, pursuant to 42 U.S.C. § 1983, based on continued detention beyond the term of her sentence, without review of that detention by a judge; (2) breach of contract, based on breach of the plea agreement, which Aquino alleged called for her immediate removal upon completion of her criminal sentence; (3) tortious breach of duty, based on alleged

⁴The court noted that Aquino's claims for punitive damages and attorneys fees were not independent of her substantive claims.

violation of the Amended Judgment and Commitment Order; and (4) intentional infliction of emotional distress, based on Aquino's continued detention, without judicial review, after the completion of her sentence. Aquino prayed for damages, attorneys fees and costs, and such other relief as is just and proper. Although Aquino alleged that the defendants' actions on which her third and fourth causes of action were based were willful, wanton, reckless, or with actual malice, and thus would entitle her to an award of punitive damages, *see* First Amended Complaint, ¶¶ 45 & 48, she did not include an express prayer for punitive damages in her Prayer For Relief.

On September 8, 2010, the Commonwealth Defendants filed their second Motion To Dismiss (docket no. 19), seeking dismissal, this time with prejudice, of all of Aquino's claims, old and new. On October 1, 2010, defendant Busenkell likewise filed a second Motion To Dismiss (docket no. 20), also seeking dismissal, with prejudice, of all of Aquino's claims. Oral arguments on these motions were set for November 10, 2010, during the undersigned's return visit to Saipan as a visiting judge. *See* Notice (docket no. 22).

By Order (docket no. 23) filed October 20, 2010, the court noted that Aquino had not responded to either of the motions to dismiss in the time provided by DNMI Civil Local Rule 7.1, nor had she filed a motion requesting an extension of her deadlines, and the court was unaware of any stipulation of the parties extending her deadline to respond. Therefore, the court gave plaintiff Aquino to and including October 27, 2010, to file responses to the pending motions to dismiss, or the matter would be dismissed for want of prosecution pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

On October 27, 2010, Aquino finally filed a consolidated Opposition (docket no. 24) to the defendants' motions to dismiss. Defendant Busenkell filed a Reply (docket no. 25) on November 4, 2010, and the Commonwealth Defendants filed a Reply (docket no. 26) on November 5, 2010.

The court heard oral arguments on the defendants' second round of motions to dismiss on November 10, 2010. Plaintiff Aquino was represented at the oral arguments by Stephen Woodruff. The Commonwealth Defendants were represented by Elchonon Golob, Assistant Attorney General for the CNMI. Defendant Busenkell was represented by Braddock Huesman. After the oral arguments, the court took the motions to dismiss under advisement. On November 10, 2010, defendant Busenkell filed corrected exhibits (docket no. 28) in support of her motion. The court now enters its ruling on these matters.

II. LEGAL ANALYSIS

A. Rule 12(b)(6) Standards

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal for “failure to state a claim upon which relief can be granted.” The court set out the standards for disposition of a Rule 12(b)(6) motion to dismiss in some detail in its prior ruling in this case. Memorandum Opinion And Order at 9-11. The court finds it unnecessary to reiterate those standards in their entirety here. Suffice it to say that the Ninth Circuit Court of Appeals has recognized that “[a] complaint may survive a motion to dismiss if, taking all well-pleaded factual allegations as true, it contains ‘enough facts to state a claim to relief that is plausible on its face.’” *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1034 (9th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), in turn quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court turns to application of this standard to each of the claims in Aquino’s First Amended Complaint, in turn, below.

B. The Due Process Claim

Aquino’s first cause of action in her First Amended Complaint, as in her original Complaint, is a claim that her due process rights were violated when she was detained

beyond the term of her sentence, without review of that detention by a judge, instead of being “immediately” deported. The defendants contend that this reiterated claim still fails to state a claim upon which relief can be granted.

1. Arguments of the parties

The Commonwealth Defendants assert that, because Aquino relies on essentially the same factual allegations that the court found failed to state a claim in her original Complaint, Aquino has still not alleged a violation of a constitutional right for her due process claim in her First Amended Complaint that can survive a renewed motion to dismiss. Similarly, defendant Busenkell argues that, because Aquino’s argument has not changed, neither should this court’s decision that she has not alleged a due process violation based on her continued detention after completion of her sentence on criminal charges, pending deportation, without a bail hearing.

In her belated Opposition, Aquino does not argue that she has alleged any new factual basis for her due process claim, nor does she agree with the defendants that she was required to do so, but she does argue a new theory for that claim. She now argues that the duration of the unlawful deprivation of her liberty goes to the measure of damages only; the gravamen of her complaint, she contends, is the unlawfulness of her being held in such manner *at all*. She argues that it was patently unlawful for her to be held even *one day* past the release date stated in the amended Judgment and Commitment Order without arrangements being made to have her continuing detention reviewed by a judge of the Commonwealth Superior Court. She contends that Commonwealth law and practice clearly establishes that immigration detention is strongly disfavored, either before or after entry of an order of deportation, and that release is available on minimal conditions. She argues that her eventual release on her own recognizance, when she was finally brought before a judge, demonstrates this practice. She contends that her continued incarceration was unlawful in several respects: (1) the Superior Court’s order only authorized her

transfer to immigration authorities for immediate deportation, not any period of pre-removal detention; (2) she may never have been reclassified as an immigration detainee; and (3) Commonwealth law requires that deportation actions be initiated in a separate civil proceeding rather than the entry of a deportation order in a criminal case, so that her sentence of deportation was illegal. She argues that the only legitimate basis for her deportation was a contractual one, pursuant to her plea agreement, and that she is entitled to strict performance of that agreement. She argues that there must be a remedy for every violation of rights.

In reply, defendant Busenkell argues that Aquino still has not identified any basis for a right or entitlement to a bail hearing during her continued incarceration pending deportation. Busenkell also argues that the court's prior holding that an 88-day detention without a bail hearing fails to state a claim speaks directly to what Aquino now asserts is the gravamen of her due process claim. In their reply, the Commonwealth Defendants, likewise, argue that Aquino has not identified any basis for her argument that she could not be held in pre-deportation detention and that this argument is contrary to established United States Supreme Court precedent. They also point out that Aquino conceded in her First Amended Complaint that she was an immigration detainee. Finally, they argue that no civil deportation proceedings were required, where Aquino stipulated to deportation as part of her plea agreement in her criminal case.

2. *Analysis*

The court agrees with the defendants that Aquino's attempt to recast the gravamen of her due process claim as detention for even a moment past the end of her criminal sentence, rather than as a claim based on detention for 88 days past the end of her criminal sentence, does nothing to establish a legal basis for her due process claim. Where detention of an alien pending deportation, without a bail hearing, for up to six months does not offend due process, *see Demore v. Kim*, 538 U.S. 510 (2003), and *Zadvydas v. Davis*,

533 U.S. 678 (2001), detention for any shorter time, such as a day or 88 days, plainly also does not.

Aquino asserts in her Opposition that the due process violation also arises from what she contends was a violation of “Commonwealth law and practice” concerning deportation. However, she has cited absolutely no authority for the existence of such “Commonwealth law and practice.” The court is not required to take as true what Aquino may allege to be such law or practice, even if she had made such an allegation in her First Amended Complaint, which she did not. *See Coto Settlement*, 593 F.3d at 1034 (the court is “not necessarily [required to] assume the truth of legal conclusions merely because they are cast in the form of factual allegations”). Nor can Aquino assert a due process violation on the basis that the order for deportation was improperly entered in a criminal case, rather than in civil proceedings, where she expressly waived any deportation hearing and stipulated to an order of deportation in her criminal case. *See Stipulation and Order* at 2.⁵

Finally, Aquino also asserts that the due process violation arises from violation of the portion of the Judgment and Commitment Order that required “immediate” deportation. Judgment and Commitment Order at 3 (“Defendant shall be released on April 11, 2009 at 8:00 a.m., and shall be released *immediately* to the CNMI or Federal Immigration Officials for *immediate* removal from the CNMI.” (emphasis added)).⁶

⁵This is so, even if the Judgment and Commitment Order can be construed to order Aquino’s deportation, rather than to order deportation as a condition of the sentence. *See* Judgment and Commitment Order at 2-3 (stating that deportation and transfer to the custody of immigration officials at the end of Aquino’s sentence was a condition of serving her sentence without parole). The Order portion of the Stipulation To Deportation, which did order that Aquino be deported, was not a sentencing order.

⁶To the extent that Aquino’s due process claim can also be construed to be based on a right to immediate deportation purportedly established by her plea agreement, that portion of her claim will be addressed in the court’s discussion, below, of whether Aquino
(continued...)

However, as a matter of law, “immediate removal” here, in the context of Aquino’s express waiver of a deportation hearing and stipulation to entry of an order for deportation, *see* Stipulation To Deportation and Order at 2, meant nothing more than removal *without further deportation proceedings*. *See, e.g.,* MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (10th ed. 1995) (defining “immediate,” *inter alia*, as “acting or being without the intervention of another object, cause, or agency”). It did not mean deportation without any delay, however reasonable, arising from the practicalities of deportation or from unforeseen circumstances.

In the alternative, even if “immediate deportation” meant deportation with no delay at all for any reason, and, thus, Aquino’s continued detention constituted violation of a due process right established by the Judgment and Commitment Order, the defendants were entitled to qualified immunity, as a matter of law, for that violation. As the court explained in its ruling on the first round of motions to dismiss,

The Ninth Circuit Court of Appeals has recently repeated the two part qualified immunity inquiry: “The qualified immunity inquiry asks two questions: (1) was there a violation of a constitutional right, and, if so, then (2) was the right at issue ‘clearly established’ such that it would have been clear to a reasonable officer that his conduct was unlawful in that situation?” *Brooks [v. City of Seattle]*, 599 F.3d [1018,] 1022 [(9th Cir. 2010)] (citing *Saucier v. Katz*, 533 U.S. 194, 201-02, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), overruled on other grounds by *Pearson [v. Callahan]*, 129 S. Ct. 808, [(2009)]). “If the [officials’] actions do not amount to a constitutional violation, the violation was not clearly established, or their actions reflected a reasonable mistake about what the law requires, they are entitled to qualified immunity.” *Id.* (citing *Blankenhorn v. City of Orange*, 485 F.3d 463,471 (9th Cir. 2007)); *Pearson*, 129 S. Ct. at 815

⁶(...continued)
has stated a viable claim of breach of contract.

(“The doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800,818, 102 S. Ct. 2727,73 L. Ed. 2d 396 (1982)).

Memorandum Opinion And Order at 14. It would *not* have been clear to a reasonable official that the Judgment and Commitment Order required deportation of Aquino without any delay, however reasonable, arising from the practicalities of deportation or from unforeseen circumstances. This is especially true, where, for example, the United States Supreme Court had clearly established that a six-month detention for deportation purposes, without a detention hearing, is presumed reasonable and will not violate an alien’s constitutional due process rights. *Denmore*, 538 U.S. at 531; *Zadvydas*, 533 U.S. at 701.

Despite two opportunities to do so, Aquino has failed to allege a *legal* basis for her claim of a due process violation, *see Brooks*, 599 F.3d at 1022 (to defeat qualified immunity, there must be a violation of a clearly established constitutional right), and has failed to show that allegations of other facts consistent with the challenged pleading could possibly cure the deficiency, *see Schreiber Distrib. Co. v. Serv-Well Furniture Co. Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Therefore, her due process claim is, again, subject to dismissal, but this time, the dismissal will be with prejudice.

C. The Emotional Distress Claim

Aquino has reiterated a claim for intentional infliction of emotional distress in her First Amended Complaint. The Commonwealth Defendants assert that this claim is, again, subject to dismissal. They argue that, because Aquino’s continued detention was not unconstitutional, it cannot be the “outrageous” conduct required for an emotional distress claim. Similarly, Busenkell argues that the reiterated claim is barred by the “law of the case” doctrine, because the basis for this claim in the First Amended Complaint is the

same as the rejected basis for this claim in the original Complaint. Aquino makes no separate argument concerning this claim in her Opposition.

Once again, the court concluded, above, that there was no due process violation in Aquino's continued detention pending deportation without judicial review, and Aquino has alleged no other "outrageous" conduct as the basis for her claim of intentional infliction of emotional distress. Thus, the court concludes, once again, that this claim also fails as a matter of law and must be dismissed. Furthermore, this time, the dismissal of this claim will be with prejudice.

D. The Breach-Of-Contract Claim

One of the "new" claims in Aquino's First Amended Complaint is a claim for breach of contract, based on alleged breach of Aquino's plea agreement. Aquino alleges that "[d]eportation from the CNMI immediately after completion of her criminal sentence was a material term of [her] plea agreement," First Amended Complaint, ¶ 16, but that the plea agreement was breached when she was not deported at the end of her sentence. First Amended Complaint, Second Cause of Action—Breach of Contract, ¶¶ 41-42.

The Commonwealth Defendants and defendant Busenkell assert that this claim fails to state a claim upon which relief can be granted, because the Stipulation to Deportation does not address the timing of Aquino's deportation. Defendant Busenkell also argues that, even if the plea agreement was breached, such a breach does not entitle Aquino to contract *remedies*. Again, Aquino makes no separate argument concerning this claim in her Opposition. However, she does argue, in the context of her due process claim, that she was entitled to strict performance of her plea agreement and that she is entitled to contract remedies for the breach of that agreement.

Plea agreements are "contractual in nature." *United States v. Nelson*, 222 F.3d 545, 548 (9th Cir. 2000) (citations omitted). Breach of a contract occurs upon the

nonperformance of a contractual duty of immediate performance. *Del Rosario v. Camacho*, 2001 MP 3 ¶ 96, 6 N.M.I. 213, 231.

Aquino refers repeatedly to a “plea agreement” in her First Amended Complaint, but she did not attach any document identified as her “plea agreement” to her First Amended Complaint, nor did she expressly quote any language of the plea agreement in the First Amended Complaint, even though the plea agreement is the basis for her breach-of-contract claim. The Judgment and Commitment Order states that “the Court accepts the terms and conditions of the plea agreement entered into by the parties and hereby sentences the Defendant pursuant to said terms and conditions,” but no plea agreement is attached to the Judgment and Commitment Order, and no terms of the plea agreement are expressly quoted in it. The only document that the defendants have identified as representing Aquino’s “plea agreement” is the Stipulation To Deportation. *See* Commonwealth Defendants’ Motion To Dismiss (docket no. 19) at 6; Defendant Busenkell’s Motion To Dismiss (docket no. 20) at 8. Aquino did not challenge the defendants’ identification of the Stipulation To Deportation as the “plea agreement” in her Opposition to the defendants’ motions to dismiss, nor did she assert that some other agreement, either written or oral, was the “plea agreement” on which her breach-of-contract claim was based. At oral arguments, Aquino’s counsel did represent that there was, indeed, a “second” plea agreement, which had never been filed with the court, that did provide for “immediate deportation.” However, counsel did not provide the court with a copy of that plea agreement, as an attachment to either Aquino’s First Amended Complaint or her Opposition and, because it was never filed, it is not a public record of which the court can take judicial notice.

Consequently, the fundamental problem with Aquino’s breach-of-contract claim is that the Stipulation To Deportation contains no term imposing a duty to release Aquino “immediately” upon the completion of her criminal sentence, nor does it otherwise identify

any timeframe for her deportation after the conclusion of her sentence, and Aquino has waived the opportunity to assert that any other plea agreement contains such a term. Instead, the Stipulation To Deportation provides for a waiver of a deportation hearing and a stipulation to an order of deportation. Stipulation To Deportation at 1 & 2. In the absence of a contractual term requiring “immediate” deportation or otherwise specifying the timing of Aquino’s deportation, Aquino’s plea agreement simply was not breached by any nonperformance of a nonexistent term. *Del Rosario*, 2001 MP 3 ¶ 96, 6 N.M.I. at 231. Therefore, Aquino’s breach-of-contract claim fails to state a claim upon which relief can be granted, and that claim must also be dismissed.

Turning to the question of whether the dismissal should be with or without prejudice, Aquino could possibly have cured this deficiency by alleging that some plea agreement other than the Stipulation To Deportation existed and had as a term a specification of the timing of her deportation after the conclusion of her sentence. *See Schreiber Distrib. Co.*, 806 F.2d at 1401 (leave to amend a dismissed claim is appropriate unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency). Although Aquino belatedly asserted at oral arguments that there was such a plea agreement, she has waived the opportunity to rely upon it by failing to attach a copy of that plea agreement, upon which her breach-of-contract claim was purportedly based, to her First Amended Complaint; by failing to demonstrate that such a plea agreement is a matter of public record of which the court could take judicial notice; and by failing to challenge the defendants’ identification of the Stipulation To Deportation as the “plea agreement” in her Opposition to the defendants’ motions to dismiss. Thus, dismissal of this claim will also be with prejudice.

E. Tortious Breach Of Duty

The second “new” claim in Aquino’s First Amended Complaint is a claim for “tortious breach of duty.” This claim is based on the allegation that violation of the Amended Judgment and Commitment Order constituted a tortious breach of duty. First Amended Complaint, Third Cause of Action—Tortious Breach of Duty, ¶ 44.

The Commonwealth Defendants argue that this claim also fails to state a claim upon which relief can be granted, because no specific tort is claimed. They also argue that they did not violate any duty to Aquino, because the 88-day pre-removal detention period was constitutional. Defendant Busenkell likewise argues that Aquino has not identified any underlying tort, but she also argues that, because the sentencing order required that Aquino be turned over to immigration officials, Busenkell was not responsible for the length of Aquino’s sentence or the fact that she was turned over the immigration officers at the end of her sentence. Aquino makes no argument whatsoever concerning this claim in her Opposition to the motions to dismiss.

The court has not found, and the parties have not identified, any recognition of a claim for tortious breach of duty under Commonwealth law. Other jurisdictions have recognized that breach of a *contractual* duty may sound in tort, where the breaching party acted in bad faith. *See, e.g., A.C. Shaw Constr., Inc. v. Washoe County*, 784 P.2d 9, 9-10 (Nev. 1989). Such a claim requires a “special relationship” between the tort victim and the tortfeasor. *State v. Sutton*, 120 Nev. 972, 989 (Nev. 2004). Here, however, it appears that Aquino’s claim of tortious breach of duty is based upon the alleged violation of a duty created by the Judgment and Commitment Order, not a duty created by any contract. Moreover, the court concluded, above, as a matter of law, that Aquino’s continued detention after the conclusion of her sentence, without review by a judge, did not violate the terms of the Judgment and Commitment Order or the Stipulation To

Deportation. Thus, where Aquino has not alleged any underlying breach of duty, there can be no claim for tortious breach of duty.

Consequently, Aquino's tortious breach of duty claim fails to state a claim upon which relief can be granted. Moreover, there is no indication that allegations of other facts consistent with the challenged pleading could possibly cure the deficiency. *See Schreiber Distrib. Co.*, 806 F.2d at 1401. Thus, dismissal of this claim will also be with prejudice.

III. CONCLUSION

Upon the foregoing, the court concludes that, as a matter of law, Aquino's First Amended Complaint states no claims upon which relief can be granted, and the First Amended Complaint must be dismissed in its entirety. Moreover, there is no showing that allegations of other facts consistent with the challenged pleadings could possibly cure the deficiencies in these claims, or Aquino has waived the opportunity to cure the deficiencies, so that the dismissal of these claims must be with prejudice.

THEREFORE,

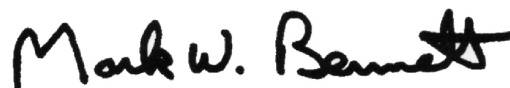
1. The Commonwealth Defendants' September 8, 2010, second Motion To Dismiss (docket no. 19) is **granted**;

2. Defendant Busenkell's October 1, 2010, second Motion To Dismiss (docket no. 20) is **granted**; and

3. Plaintiff Aquino's August 25, 2010, First Amended Complaint (docket no. 18) is **dismissed, in its entirety, with prejudice**.

IT IS SO ORDERED.

DATED this 5th day of January, 2011.



MARK W. BENNETT
U. S. DISTRICT COURT JUDGE

NORTHERN DISTRICT OF IOWA
VISITING JUDGE